No. 93-397

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In The

Supreme Court of the United States

October Term, 1993

ASSOCIATED INDUSTRIES OF MISSOURI AND ALUMAX FOILS, INC.,

Petitioners,

v.

JANETTE M. LOHMAN, DIRECTOR OF REVENUE, AND DELONG'S, INCORPORATED, THE CITY OF BLUE SPRINGS, GARY MARKENSON, THE MISSOURI ASSOCIATION OF COUNTIES, THE MISSOURI MUNICIPAL LEAGUE, AND THE ASSOCIATED GENERAL CONTRACTORS OF MISSOURI,

Respondents.

On Petition For Writ Of Certiorari
To The Supreme Court Of Missouri

BRIEF OF RESPONDENTS, THE MISSOURI ASSOCIATION OF COUNTIES, THE MISSOURI MUNICIPAL LEAGUE, DELONG'S, INCORPORATED, THE CITY OF BLUE SPRINGS, GARY MARKENSON, AND THE ASSOCIATED GENERAL CONTRACTORS OF MISSOURI IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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OPINIONS BELOW

The Opinion (joined in by 6 of the 7 Judges) of the Missouri Supreme Court and the Dissenting Opinion filed June 29, 1993, are reproduced as Appendix A to the

Petition for Writ of Certiorari. The unreported Judgment of the Circuit Court of Cole County dated July 15, 1992, is reproduced as Appendix B to the Petition for Writ of Certiorari at A-35.

JURISDICTIONAL STATEMENT

The opinion and judgment of the Missouri Supreme Court was entered on June 29, 1993. Petitioners did not file a motion for rehearing as is authorized by Rule 84.17, Missouri Rules of Civil Procedure. Petitioners assert jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES

In addition to the constitutional and statutory provisions set forth in the Petition for Writ of Certiorari, the following provisions are noted:

CONSTITUTION OF MISSOURI, Article X, § 1:

> "The taxing power may be exercised by the general assembly for state purposes, and by counties and other political subdivisions under power granted to them by the general assembly for county, municipal and other corporate purposes."

CONSTITUTION OF MISSOURI, Article X, § 10(b):

> "Nothing in this constitution shall prevent the enactment of general laws directing the payment of funds collected for state purposes to counties or other political subdivisions as state aid for local purposes."

The Missouri General Assembly has authorized local governments (primarily counties and municipalities) in Missouri to impose multiple sales taxes on sales of tangible personal property sold within their jurisdictions. These are authorized, *inter alia*, by Sections 66.600 to 66.635, 67.500 to 67.545, 92.400 to 92.420, 94.500 to 94.519, 94.600 to 94.655, and 94.700 to 94.745, RSMo. There are no Missouri statutes which authorize local governments in Missouri to impose use taxes.

STATEMENT OF THE CASE

Associated Industries of Missouri ("AIM") and Alumax Foils, Inc. ("Alumax"), initiated this case challenging the constitutionality of the local use tax which was authorized by Section 144.748, RSMo. Supp. 1991. The trial court, after a trial, upheld the constitutionality of the local use tax law. The Missouri Supreme Court, *en banc*, affirmed in a 6-1 decision.

Missouri imposes a statewide sales tax for state purposes of 4.225 percent of the sales price of tangible personal property sold in Missouri, and compensating use taxes for state purposes of 4.225 percent of the sales price of tangible personal property sold outside of Missouri but stored, used or consumed in Missouri. For a number of years, the Missouri General Assembly through various statutes[1]

[1] These statutory enactments include Sections 94.510, 94.577, 94.600, 94.700, 66.600, 67.391, 67.505, 67.547, 67.550, 67.581, 67.582, 67.583, 67.590, 67.700, 67.729, 67.730, 67.734 and 67.782, RSMo.

has authorized counties and municipalities[2] to levy sales taxes. The aggregate of the local sales taxes imposed by a county and a municipality at some locations in Missouri is as high as 3.3 percent above the 4.225 percent statewide sales tax. In 1990 the Missouri General Assembly, by enacting Section 144.747, RSMo, authorized political subdivisions which had adopted local sales taxes to adopt local use taxes, as well, following the same procedures. To adopt local sales taxes, the local political subdivisions generally had to follow certain procedures specified by statute, including conducting a local election to approve the sales tax. No political subdivision adopted a local use tax pursuant to Section 144.747, RSMo. Section 144.748, RSMo. Supp. 1991, authorizes an additional statewide use tax in the amount of 1.5 percent, which is distributed to local political subdivisions for local use.

Alumax is a corporation with its principal place of business located in the City of St. Louis. There is no evidence in the record that Alumax conducted business at other locations in Missouri. The aggregate of local sales taxes within the City of St. Louis is 1.5% – the same rate as the local use tax here being challenged. AIM is, as its name indicates, an association of companies having operations in Missouri. The record does not establish that AIM has members which are located at places in Missouri where the combined local sales tax rate is less than 1.5 percent.

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[2] Generally, Missouri counties and municipalities are the only local political subdivisions authorized by statute to adopt local sales taxes. Local sales taxes were authorized for the support of one school district in Missouri.

The named Defendant (a Respondent) in his action is the Director of the Missouri Department of Revenue (the "Director"). The Director collects all sales and use taxes in Missouri, including sales taxes levied locally and the local use tax. With respect to local sales taxes and the local use tax, a small percentage of the amounts collected goes into the general revenue of the state to cover expenses of administration and collection, and the balance is then remitted to the counties and municipalities which have adopted local sales taxes on a pro-rata basis.

There are 114 counties in Missouri plus the City of St. Louis. One hundred twelve of the Missouri counties are members of Intervenor Defendant The Missouri Association of Counties (a Respondent here). Intervenor Defendant Missouri Municipal League (a Respondent here) represents the interests of 540 Missouri municipalities. Intervenor Defendant City of Blue Springs (a Respondent here) is a Missouri municipality. The combined local sales rate within Blue Springs (including both those imposed by the City itself and by Jackson County) is 2.25 percent. Intervenor Defendant DeLong's, Incorporated (a Respondent here) is a steel fabricator located in Jefferson City where there is a combined local sales tax rate of 2 percent. Even with a 1.5 percent local use tax on steel products shipped into Missouri, DeLong's, Incorporated, is at a competitive disadvantage with respect to its steel products sold from Jefferson City because of the very small profit margin in the steel fabrication business. Intervenor Defendant Associated General Contractors of Missouri (a Respondent here) is a trade association of general contractors in Missouri and Intervenor Gary Markenson (a

Respondent here) is a citizen and taxpayer of Jefferson City where the combined local sales tax rate is 2 percent.

In Missouri local sales taxes are imposed at the tax rate in effect at the location of the seller – even if the seller delivers the goods purchased to the buyer at a location where the combined local sales tax rate is higher or lower than that in effect. *Fabick & Co. v. Schaffner,* 492 S.W.2d 737 (Mo. 1973). The Missouri Supreme Court has indicated that use taxes in Missouri are imposed at the location of the first place in the state at which a buyer exercises the privilege of storing or consuming the tangible personal property, *Kansas City Power & Light Co. v. Director of Revenue,* 783 S.W.2d 910 (Mo. banc 1990), though it has not been necessary to decide whether the use tax should be imposed at one location within the state rather than another location within the state.

The figures of "1573 taxing jurisdictions in Missouri" with "841" of those having an "aggregate sales tax" of less than 5.725 percent referred to by Petitioners in their Petition (page 3) are not in the record. That assertion is also misleading. There are "taxing jurisdictions" in Missouri other than counties and municipalities, but *only* counties and municipalities have statutory authority to impose local sales taxes in addition to the combined 4.225% statewide sales tax rate. It is known that there are 114 counties in Missouri plus the City of St. Louis. Only two small counties do not have a local sales tax. The precise number of municipalities in Missouri is not in the record, though there are at least 540 municipalities. With the exception of the City of St. Louis (which has a combined local sales tax rate of 1.5 percent, which with the 4.225 percent state sales tax rate aggregates a rate of 5.725

percent), when a seller is located within a municipality a sale may be subject to local sales taxes authorized by different taxing authorities – both local sales taxes levied by the county (which may be multiple taxes) and local sales taxes levied by the municipality (which also may be multiple taxes).

The record herein reflects that at the time of the enactment of Section 144.748, RSMo. Supp. 1991, providing for the 1.5 percent local use tax here challenged, the then Missouri Director of Revenue had presented to the Missouri General Assembly data with respect to the amount of sales in Missouri during 1990 third quarter which were subject to the various aggregate sales tax rates (combined state and local) in effect in Missouri. That 1990 third quarter data is also in the record in this case, as follows:

Combined Local Sales Tax Rate	Aggregate State and Local Sales Tax Rate	Amount of Sales Subject to Aggregate Tax Rate	Percent of Total Missouri Sales
3.5%	7.725%	546,209	.01%
3.0%	7.225%	78,156,177	.85%
2.75%	6.975%	35,148,134	.38%
2.625%	6.85%	571,926	.01%
2.5%	6.725%	649,940,690	7.10%
2.375%	6.6%	5,404,593	.06%
2.25%	6.475%	1,826,949,717	19.96%
2.125%	6.35%	163,085,316	1.78%
2.0%	6.225%	1,155,171,732	12.62%
1.875%	6.1%	33,312,842	.36%
1.75%	5.975%	899,261,373	9.82%
1.525%	5.858%	14,198,470	.16%

Percent of total sales in Missouri subject to combined local sales taxes in excess of 1.5 percent –			53.11%
1.5%	5.775%	3,555,320,700.56	38.84%
Percent of total sales in Missouri subject to combined local sales taxes equal to or in excess of 1.5 percent –			91.85%
1.375%	5.6%	46,722,463	.51%
1.25%	5.475%	8,528,222	.09%
1.0%	5.225%	257,546,619	2.81%
.875%	5.1%	19,496,338	.21%
.75%	4.975%	55,837,734	.61%
.625%	4.850%	13,073,192	.14%
.5%	4.725%	288,961,923	3.16%
.375%	4.6%	10,767,694	.12%
Percent of total sales in Missouri subject to combined local sales taxes of less than 1.5 percent –			7.65%
Percent of total sales in Missouri for period subject to local sales taxes –			99.6%
-0-	4.225%	36,561,707	.40%
Percent of total sales for period in Missouri not subject to a local sales tax –			.40%

For all of 1990, had a uniform local sales tax *limited* to a tax rate of 1.5 percent been applied to all sales subject to sales tax in Missouri, such would have resulted in local sales taxes totaling $534,950,982.71. In actuality, because of combined local sales tax rates in effect in many localities of in excess of 1.5 percent, *over* $100,000,000 *more* in local sales taxes were collected (A37-38, Petition). Consequently, even with the imposition of a local use tax of 1.5 percent, sales in intrastate commerce in Missouri

are subject to an annual local sales tax overburden of approximately $100,000,000 more than the sales made in interstate commerce.

While there are some areas of Missouri where there are combined local sales taxes of 1.5 percent or less in effect, over 92% of the sales in Missouri are made by businesses which are located within municipalities where both the municipality and county impose combined sales taxes of 1.5 percent or more. Only a few scattered businesses accounting for only .4% of the total sales subject to sales tax in Missouri are located in areas where there is no local sales tax.

The record reflects, and the trial court so found (page A38, Appendix B, Petition) that the predominant local sales tax rates will remain at 1.5% or higher for so long as Section 144.478, RSMo. Supp. 1991, remains in effect.

REASONS FOR NOT GRANTING THE WRIT

I. PETITIONERS DID NOT EXHAUST THEIR RIGHTS OF REVIEW BEFORE THE MISSOURI SUPREME COURT.

The Missouri Supreme Court issued the Opinion of the Court and the Dissenting Opinion of one of its Judges on June 29, 1993. Rule 84.17, Missouri Rules of Civil Procedure, authorizes a party to file a motion for rehearing within 15 days after the Court's Opinion is filed. The purpose of such motion as set forth in that Rule " . . . is to

call attention to material matters of law or fact overlooked or misinterpreted by the court, as shown by its Opinion."

Petitioners could have filed a motion for rehearing in the Missouri Supreme Court with respect to that Court's Opinion of June 29, 1993, and should have done so if they believed that "material matters of law . . . [were] misinterpreted by the court." Petitioners, however, failed to file a motion for rehearing with the Missouri Supreme Court. Inasmuch as Petitioners failed to exhaust their rights of review before the Missouri Supreme Court pursuant to the Missouri Rules of Civil Procedure, the Supreme Court of the United States should *not* exercise its discretion and issue a writ of certiorari to review the decision of the Missouri Supreme Court.

And while the Opinion below was not a Divisional Opinion of the Missouri Supreme Court as was the case in *Osment v. Pitcairn*, 317 U.S. 587 (1942), where this Court found that the failure to file an after opinion motion in the Missouri Supreme Court was fatal to this Court's jurisdiction to issue a writ of certiorari, the United States Supreme Court should nevertheless decline to issue a writ of certiorari when Petitioners who are sophisticated litigants failed to avail themselves of a further avenue for review and reconsideration provided by the Rules of the Missouri Supreme Court.

II. PETITIONERS DO NOT HAVE STANDING IN THIS COURT UPON THE RECORD IN THIS CASE TO CHALLENGE THE CONSTITUTIONALITY OF MISSOURI'S LOCAL USE TAX LAW.

In *Lujan v. Defenders of Wildlife*, 112 S.Ct. 2130 (1992), this Court set forth a three-prong test that must be met before a plaintiff has standing in this Court to raise a challenge to governmental action – (1) the plaintiff must have suffered an "injury in fact", i.e., an invasion of a legally-protected interest which is concrete and particularized, and actual or imminent, not conjectural or hypothetical; (2) there must be a causal connection between the injury and the conduct complained of; and (3) it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. Petitioners do not meet all three of these tests, and consequently Petitioners do not have standing to seek a writ of certiorari to review the decision of the Missouri Supreme Court.

While the Missouri Supreme Court determined that the Petitioners had standing *under Missouri law* to raise constitutional challenges to the local use tax law, that decision is not determinative of standing before this Court under Federal law.

For Petitioners to demonstrate standing under Federal law to raise a Federal constitutional challenge to Section 144.748, RSMo. Supp. 1991, authorizing a local use tax in Missouri, they must clearly demonstrate that they have paid local use taxes at a particular location (or perhaps clearly demonstrate that they will actually pay

local use taxes at such particular location – not a "conjectural or hypothetical" payment) which are in excess of the local sales taxes which are imposed at that location. Only by such a clear demonstration can an "injury in fact" be shown.

Local sales taxes in Missouri are imposed at the aggregate tax rate in effect at the place of business of the seller, and even if the seller delivers the goods to the purchaser at a location where there is a lesser aggregate local sales tax rate in effect (or no local sale tax rate in effect), the aggregate local sales tax rate charged is that which is in effect at the place of business of the seller. *Fabick & Co. v. Schaffner,* 492 S.W.2d 737 (Mo. 1973). Use taxes, however, are considered to be imposed at the time and place in the state at which the taxpayer exercises the privilege of storing or consuming the tangible personal property subject to use tax.

The record reflects that Alumax has a principal place of business within the City of St. Louis where the aggregate local sales tax rate is 1.5 percent. The record does *not* reflect any other business location in Missouri at which Alumax takes delivery of goods. Similarly, the record is devoid of any evidence that AIM or any of its members have a business location in Missouri at which it takes delivery of goods and at which the aggregate local sales tax rate in effect is less than 1.5 percent. Alumax and AIM have therefore not shown any "injury-in-fact" by the demonstration of a higher local use tax in effect at a location where they take deliveries of goods than the aggregate local sales tax rate in effect at such location.

The record does reflect that Alumax and some members of AIM pay use taxes. The record also reflects that some members of AIM pay local sales taxes on some purchases from Missouri sellers at a rate of less than 1.5 percent. But, since the local sales taxes are imposed at the seller's place of business rather than at the buyer's business location as is the case with a use tax, Petitioners have not demonstrated a local sales tax rate which is lower than the local use tax at their business locations. Hence, they have not demonstrated an "injury-in-fact" so as to have standing to challenge the constitutionality of the local use tax law.

III. MISSOURI'S UNIFORM LOCAL USE TAX LAW REDUCES THE EXISTING LOCAL SALES TAX OVERBURDEN ON INTRASTATE COMMERCE, DOES NOT DISCRIMINATE AGAINST INTERSTATE COMMERCE, CAN BE RATIONALLY AND READILY UNDERSTOOD AND APPLIED BY ALL INVOLVED, AND DOES *NOT* VIOLATE THE COMMERCE CLAUSE.

While Petitioners before the Missouri trial court and the Missouri Supreme Court attempted to assert multiple Federal and state constitutional challenges to Missouri's local use tax law, Section 144.748, RSMo. Supp. 1991, Petitioners' challenge here is predicated solely upon the Federal Commerce Clause – Article I, Section 8, Clause 3, United States Constitution. Even assuming, *arguendo,* that this court determines that the grounds set forth under I and II, *supra,* are not valid reasons for denying the Petition, the Missouri Supreme Court in its Opinion of June 29, 1993 (pages A-1-24, Appendix A to Petition) fully

considered the Federal Commerce Clause issue and correctly decided that the Missouri local use tax law did *not* violate the Federal Commerce Clause. It is clear from a consideration of the Opinion by Judge Price on behalf of six of the seven Judges participating in the case that the arguments here advanced by Petitioners in their Petition were considered by the Missouri Supreme Court and were properly rejected. Petitioners offer no compelling reasons why the decision of the Missouri Supreme Court, which follows the controlling precedent of this Court in *General American Tank Car Corp. v. Day*, 270 U.S. 367 (1925), should be further considered.

The first case cited by Petitioners under their first reason for granting the writ, *Freeman v. Hewitt*, 329 U.S. 249 (1946) (page 7 of Petition), was specifically discredited by this Court in *Complete Auto Body Transit, Inc. v. Brady*, 430 U.S. 274 (1977), when it specifically overruled *Spector Motor Service v. O'Connor*, 340 U.S. 602 (1951). In discussing *Freeman*, the progenitor of *Spector*, this Court in *Complete Auto Body* noted:

> "The rule announced in Freeman was viewed in the commentary as a triumph of formalism over substance, providing little guidance even as to formal requirements." 430 U.S. at 281.

Petitioners assert the discredited approach of "formalism over substance" in determining whether a state tax imposes an unconstitutional burden upon interstate commerce under the Commerce Clause. It is the third prong of the four-prong test set forth in *Complete Auto Body* which is to be considered here – whether or not the tax "discriminate(s) against interstate commerce."

In determining that the Missouri local use tax law as applied does *not* discriminate against interstate commerce and therefore does *not* violate the Commerce Clause, both the trial court and the Missouri Supreme Court properly relied upon and followed *General American Tank Car Corp. v. Day, supra* (per Justice Stone for a unanimous court, which included Justices Holmes, Brandeis and Taft). *General American* has not been overruled or questioned by any later decision of this Court and is controlling.

In *General American* a Commerce Clause (along with an Equal Protection) challenge was made to a Louisiana taxing scheme which taxed the rolling stock of *non-residents* doing interstate business at 25 mils on the dollar at the state level while tax rates on the rolling stock of taxpayers domiciled in Louisiana were locally taxed at varying amounts:

> "In some parishes, local taxes exceed twenty-five mils, and in others they are less than that amount; but it is asserted by the appellee that the *average of all local property taxes* is approximately twenty-five mils." (emphasis added). 270 U.S. at 371.

There was evidence in *General American* that some of the rolling stock of Louisiana companies were taxed at rates *less* than 25 mils on the dollar, and in some parishes the rate of local taxes was as high as 31 mils on the dollar. This Court in *General American* rejected the Commerce Clause challenge and upheld the constitutionality of the Louisiana taxing scheme. In rejecting the Commerce Clause challenge, this Court in *General American* reasoned:

"There being no question as to the amount of the tax or the method of its computation, the taxation of appellants' property within the State can be open to no objection unless it operates to discriminate in some substantial way. . . .

* * *

"We are not concerned with the particular method adopted by Louisiana of allocating the tax between the State and its political subdivisions. That is a matter within the competency of the state legislature.

* * *

"The court below found, as did the state Supreme Court in *Union Tank Car Co. v. Day, supra,* that all *local taxes throughout the State* from which appellants are exempted by the Louisiana constitution, *average approximately twenty-five mils,* and that, *since the tax assessed* under § 5 *was substantially the equivalent* of the local tax in lieu of which it was assessed, *there was no unjust discrimination.*

* * *

"Where the statute imposing a tax which is in lieu of a local tax assessed on residents, discloses no purpose to discriminate against nonresident taxpayers, and in substance does not do so, *it is not invalid merely because equality in its operation has not been attained with mathematical exactness."* (emphasis added) 270 U.S. at 372-373.

The Court in *General American,* in determining whether the state levied tax on rolling stock in interstate commerce was discriminatory was concerned with whether the *average* of the local imposed tax upon rolling

stock of domestic companies was less than the uniform state rate. When it was determined that the average local rate was "approximately 25 mils" as compared with the uniform state rate of 25 mils on the rolling stock in interstate commerce, this Court concluded that there was no improper discrimination shown and therefore there was no violation of the Commerce Clause. In reaching its conclusion in *General American,* this court relied upon *Travellers' Insurance Company v. Connecticut,* 185 U.S. 364 (1901), which had in turn reasoned:

> "The clear purpose of the legislature in fixing the mode of valuation for the property subject to a single rate [for non-residents] for special taxation and valuation for the property [of residents] subject to widely varying rates for municipal taxation, was to *approximate a general equality in the burden* that should fall on the two classes of property. . . . " (emphasis added) 185 U.S. at 368.

Here, the average combined local sales tax rate is substantially higher than 1.5 percent – as evidenced by the fact that if sales in intrastate commerce subject to sales tax were uniformly taxed at only a local sales tax rate of 1.5 percent, such would result in a *decrease* of over $100,000,000 in local sales taxes raised annually. Approximately 53.11% of all taxable sales in Missouri in intrastate commerce are subject to a combined local sales tax rate in excess of 1.5 percent, and approximately 38.84% of all taxable sales in Missouri in intrastate commerce are subject to a combined local sales tax rate equal to the local sales tax rate of 1.5 percent.

A review of the local sales tax rates in the record reflects that those rates are generally higher in areas where commercial activity is concentrated. Sales within the City of St. Louis, the City of Kansas City and St. Louis County which are subject to a sales tax are all subject to a combined local sales tax rate equal to or in excess of 1.5 percent.

Petitioners rely principally upon *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64 (1963), *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318 (1977), *Maryland v. Louisiana*, 451 U.S. 725 (1981), and *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), just as they did before the Missouri Supreme Court. Judge Price, speaking for the Missouri Supreme Court in the Opinion of June 29, 1993, quite properly distinguished each of those cases. See Appendix A to the Petition. The rationale of Judge Price in distinguishing those cases need not be repeated but is instead incorporated by reference here. It is further noted that both *Halliburton and Boston Stock Exchange* predated the seminal decision in *Complete Auto Body*, so to the extent, if any, that *Halliburton and Boston Stock Exchange* are not in harmony with the discrimination prong of the *Complete Auto Body* test, they are distinguishable. Furthermore, neither *Halliburton, Boston Stock Exchange, Maryland v. Louisiana, Bacchus Imports*, nor any other case by this Court relied upon by the Petitioners in their Petition involved an analogous situation to that which is here present – where the tax on transactions in intrastate commerce was on average much higher than the uniform tax on transactions in interstate commerce.

Under the decisions of this Court, contrary to the suggestions of the Petitioners, a state may properly require those engaged in interstate commerce to pay their just share of the tax burden:

> "It was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing business." *Western Live Stock v. Bureau of Revenue*, 300 U.S. 250, 254 (1938).

While Petitioners complain of an uniform local use tax rate of 1.5 percent, the realities are that an uniform local use tax rate of 1.5 percent set forth in Section 144.748, RS Mo. Supp. 1991, is under the situation existing in Missouri the fairest, most workable and least discriminatory of the local use tax alternatives. Consider, for example, the following:

1. The uniform local use tax rate of 1.5 percent and the mechanism set forth in Section 144.748, RSMo. Supp. 1991, results in the taxpayers subject to use taxes paying less taxes on average than would be the case if the varying aggregate local sales tax rates were in effect.

2. It is impossible to tie a local use tax rate precisely to an aggregate local sales tax rate inasmuch as local sales taxes are levied at the location of the seller's business whereas local use tax rates, if tied to a particular location in the state, would be tied to the first place in Missouri at which the taxpayer exercises the privilege of storing or consuming the tangible personal property subject to use tax. Consequently, under the perfect

equality rationale (which does not in fact exist in the taxing area) of the Petitioners, since the local sales taxes upon a sale in intrastate commerce are levied at a different location than a local use tax with respect to a comparable sale in interstate commerce, perfect "equality" is not possible. Therefore, under Petitioners' rationale, no local use tax could be properly levied. What Petitioners are in effect ultimately seeking to avoid is *any* compensating local use tax. Such is contrary to the concept expressed in *Western Live Stock* that interstate commerce should bear its fair share of the state and local tax burden.

3. A uniform local use tax rate of 1.5 percent avoids the administrative nightmares which would be encountered if local use tax rates were required to be identical in all instances to the combined local sales tax rate at every location within the state. These are administrative nightmares for the out-of-state seller required to collect the local use tax, the taxpayer, and the Director of Revenue in collecting the tax. As an example, let us assume that a Missouri resident with a post office address of Excelsior Springs, Missouri, purchases goods out of state from a seller who has a sufficient nexus with Missouri to be subject to a requirement to collect Missouri use taxes. The goods are shipped to an Excelsior Springs address. From the record in this cause, if the goods are received at the purchaser's address, it can be discerned that (i) if the purchaser lives within that part of Excelsior Springs which is in Ray County the combined local sales tax would be 3.5

percent, (ii) if the purchaser lives within that part of Excelsior Springs which is in Clay County the combined local sales tax would be 2.75%, (iii) if the purchaser has a post office address of Excelsior Springs but receives delivery at his residence in Ray County outside the city limits of Excelsior Springs, the combined local sales tax rate would be 1.5 percent, and (iv) if the purchaser has a post office address of Excelsior Springs but receives deliveries at his residence in Clay County outside the city limits of Excelsior Springs, the combined local sales tax rate would be .75 percent. And another alternative could be that the purchaser was not at home when the delivery was attempted and the purchaser was then left a note to pick up the goods at the Post Office, the Federal Express office, the United Parcel Service office, the trucking company office, or other carrier involved. Query in what location each such office where a purchaser might take delivery is located. How can one reasonably expect a clerk for an out-of-state vendor to ascertain the proper rate and jurisdictions to report in such situations. And how can a clerk at the Missouri Department of Revenue be reasonably expected to ascertain and decipher the permutations of residence that might be involved. And for that matter, the point at which a purchaser taxpayer actually will take delivery cannot necessarily be predicted until the purchaser takes delivery.

When one multiplies the Excelsior Springs example by the statistical possibilities that might occur in determining the

tax rate on purchases because of the permutations resulting upon consideration of county local sales taxes, local municipal sales taxes, the vagarities of a postal address being within or without a particular county or municipality, and the vagarities of delivery of goods at different locations notwithstanding a projected delivery address, it becomes readily apparent that the determination of a proper local use tax to be applied would be a nightmare for all concerned.

4. The permutations of the varying situations involved in determining the proper local use tax due which are noted in the preceding paragraph do not, however, give consideration to the abuses which could readily occur in such system by taxpayers seeking to avoid the payment of use taxes. Since use taxes are normally imposed at the first place in the state where the taxpayer exercises the privilege of storing or consuming the tangible personal property, the "sophisticated" taxpayer with expert counsel would undoubtedly seek to "receive" the goods from out of state at a location where there are little or no local sales taxes – and hence, under this assumed situation, little or no use taxes would be paid. In such a situation, the temptation to take advantage of such tax "avoidance" device would, it is believed, be difficult for many "sophisticated" taxpayers to resist. The Constitution does not require Missouri to "build in" such a loop hole of tax avoidance.

Interstate Buses Corporation v. Blodgett, 276 U.S. 245 (1928), *Lane Construction Corporation v. Comptroller of the Treasury*, 178 A.2d 904 (Md. 1962), and *Don McCullagh, Inc. v. State*, 93 N.W.2d 252 (Mich. 1958), involved taxing schemes which were asserted to be violative of the Commerce Clause. In each case, the Court relying upon *General American* held that perfect equality was not required and rejected the Commerce Clause challenge. Other cases where courts have looked to the totality of a state taxing scheme and have rejected a Commerce Clause challenge even though the taxes on interstate and intrastate commerce were not in all instances equals but were on average equivalent, include *Consolidated Freightways v. Department of Revenue*, 477 N.W.2d 44 (Wis. 1991); *WKBH Television v. Wisconsin Department of Revenue*, 250 N.W.2d 290 (Wis. 1977); and *Department of Revenue v. Warren Petroleum Corporation*, 119 N.E.2d 215 (Ill. 1954).

Petitioners rely, as they did before the Missouri Supreme Court, upon *Phillips v. Oklahoma Tax Commission*, 577 P.2d 1278 (Okla. 1978) and *American Modulars Corporation v. Lindley*, 376 N.E.2d 575 (Ohio 1978). The Missouri Supreme Court in its opinion properly distinguished those cases. It is further noted that even though both *Phillips* and *American Modulars* were decided after the seminal decision in *Complete Auto Body*, neither decision considered or cited *Complete Auto Body* – let alone discussed the triumph of substance over formalism reflected in *Complete Auto Body*. Furthermore, the prime authority for *American Modulars* was *Freeman v. Hewitt, supra*, which was repudiated by this Court in the *Complete Auto Body* decision.

Other cases cited by Petitioners were properly distinguished by Judge Price of the Missouri Supreme Court, and we will therefore not lengthen this Brief to further discuss those cases.

The Commerce Clause assertions of the Petitioners are without merit and no writ of certiorari should issue.

IV. *GENERAL AMERICAN* REQUIRES THE RESULT REACHED BY THE MISSOURI SUPREME COURT AND IT SHOULD NOT BE OVERRULED.

In their second ground for asserting that this Court should grant a writ of certiorari, Petitioners assert that *General American* does not require the result reached by the Missouri Supreme Court, and then alternatively argue that if so, *General American* should be overruled. The assertion that *General American* does not require the result reached by the Missouri Supreme Court is a mere reargument of the first asserted ground by the Petitioners for granting the writ, which we have previously discussed.

General American has been viable and controlling case law for 67 years. Petitioners have not shown any proper reason why, after 67 years, *General American* should be overruled. *General American* has not heretofore been questioned in any opinion of this Court.

CONCLUSION

Because Petitioners have not demonstrated entitlement to relief and for the reasons hereinabove set forth, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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